American Arbitration Association

In the Matter of an Arbitration	)	
	)	
Between	)	
	)	**ARBITRATOR'S**
KITSAP COUNTY DEPUTY SHERIFF'S GUILD	)	
	)	**DECISION AND AWARD**
And	)	
	)	
KITSAP COUNTY	)	
	)	
(Craig Montgomery Termination; 75 L 390 00240 02)	)	
_____	)	

I. INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the KITSAP COUNTY DEPUTY SHERIFF'S GUILD (hereinafter the GUILD), on behalf of Craig Montgomery, and KITSAP COUNTY (hereinafter the EMPLOYER or COUNTY), under which DAVID GABA was selected to serve as Arbitrator and under which his Award shall be final and binding among the parties.

Hearings were held before Arbitrator Gaba on January 13-17, 2003, and March 24-26, 2003, in Port Orchard, Washington. The parties had the opportunity to examine and cross-examine witnesses, introduce exhibits, and fully argue all of the issues in dispute. A transcript of the proceedings was provided. Both parties filed post-hearing briefs that were received on June 3, 2003.

APPEARANCES:

On behalf of the Guild:

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II. ISSUES

The Kitsap County Deputy Sheriff's Guild and Kitsap County are parties to a collective bargaining agreement.[1]

The parties stipulated to the following issue:

> Did the County discipline Craig Montgomery without just cause, and if so, what is the remedy?

[1] Exhibit E-17

III. CONTRACT PROVISIONS

The Collective Bargaining Agreement provides that the Kitsap County Sheriff's Office has "the right to discipline or discharge employees for just cause."[2] The following Sheriff's Office Policies are relevant to the alleged violations:

4.01.00	General Behavior
4.01.01	Performance of Basic Duties
4.01.07	Obedience to Rules
4.02.03	Conduct Towards Others (a,b,e)
4.02.17	Recommendation regarding Disposition of Court Cases
4.02.25	Off-Duty Disputes (Response by on-duty officer)
6.01.03	Reports (Timely and accurate)
6.01.06	Reports (general) (a,b,d)
6.03.03	Property and Evidence (Taking property into custody) (B,C)
6.03.15	Property and Evidence (Conversion)

The following Civil Service Rules are relevant to the alleged violations:

Section 11.3.	Discipline—Good Cause—Illustrated. The following are declared to illustrate adequate causes for discipline; discipline may be made for any other good cause:
Section 11.3.01	Incompetency, inefficiency, inattention to, or dereliction of duty;
Section 11.3.02	Dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public or a fellow employee, any other act of omission or commission tending to injure the public service, or any other willful failure on the part of the employee to properly conduct himself;
Section 11.3.04	Dishonest, disgraceful, or prejudicial conduct;
Section 11.3.07	False or fraudulent statements or fraudulent conduct by an

[2] Exhibit E-17 (Article I, Section I, Rights of Management)

applicant, examinee, eligible, or employee, or such actions by others with his or her collusion;

Section 11.3.10 Violation of reasonable requirements promulgated by the Sheriff's Written Rules;

Section 11.3.11 Any other cause, act, or failure to act which, under law or these Rules, or the judgment of the Commission, is grounds for or warrants dismissal, discharge, removal or separation from the service, demotion, suspension, forfeiture of service credit, deprivation of privileges or other disciplinary action.

IV. FACTS

Craig Montgomery worked for the Kitsap County Sheriff's Office as a Reserve Deputy from 1991 until July 1993, when he was hired as a full-time officer. His assignments to various positions in the Patrol Division included line officer, traffic officer, and training officer. He served as President of the Kitsap County Sheriff's Guild from 1999-2001, during which time he was a training officer in the Patrol Division. Subsequent to his tenure as President of the Guild, he was promoted to the rank of Sergeant.

In February 2001, the Kitsap County Sheriff's Office Chief of Detectives, Mike Davis, provided Undersheriff Dennis Bonneville with a Child Protective Services (CPS) complaint alleging child abuse by Sergeant Montgomery against his son, Young-man C. The issue had arisen when school officials had questioned Young-man C about his attempt to sell nonprescription medications to his fellow middle school students by passing them off as illegal drugs. Young-man C not only had stated to school officials that he feared physical retribution if his father found out about the incident, but also had indicated that he had experienced previous physical abuse by his father. The school counselor reported the allegations to Child Protective Services.

Undersheriff Bonneville and Patrol Chief Wayne Gulla, Sergeant Montgomery's immediate supervisor, found that there had been a previous Child Protective Services complaint against Sergeant Montgomery in 1988, and concluded that an investigation was warranted. They further decided that an outside agency should conduct the investigation, and contacted Captain Paul Beckley, Commander of the Criminal Investigations Division of the Washington State Patrol, with the proviso that the detective chosen to conduct the investigation not be one assigned to Bremerton, in order to preserve Sergeant Montgomery's privacy.

In March 2001, Washington State Patrol Detective Dean Fenton was chosen to conduct the investigation of the child abuse allegations against Sergeant Montgomery. He proceeded to collect information from Child Protective Services and to interview the principal and counselors at Young-man C's school, as well as his step-sister, probation officer, and other school staff who were referenced in the earlier Child Protective Services report. Detective Fenton also interviewed Young-man C's mother (and Sergeant Montgomery's ex-wife), Sara Brees, as well as Carole Merritt and Kymm Cox, ex-girlfriends of Sergeant Montgomery with whom he had previously resided.

On March 14, 2001, Detective Fenton asked Lieutenant Loreli Thompson of the Lacey Police Department to assist him in interviewing Young-man C. During this interview, Young-man C described alleged physical abuse at the hands of his father. Detective Fenton went on to interview "Young-man P," a friend to whom Young-man C indicated he had confided, and who relayed incidents of abuse that had been described to him by Young-man C. Detective Fenton then interviewed Sergeant Montgomery and his current wife, during which interview Sergeant Montgomery denied the allegations of abuse.

On or around March 28, 2001, Detective Fenton prepared an Investigative Report

concluding that Sergeant Montgomery had abused his son. He forwarded his report and a "Certification for Determination of Probable Cause"[3] to Claire Bradley of the Kitsap County Prosecutor's Office. On May 2, 2001, Kitsap County Prosecutor Russell Hauge issued a "Decline to Prosecute Notice"[4] with respect to felony child-abuse charges, for which he considered there was insufficient evidence to prove criminal assault.

In the course of his investigation, Detective Fenton discovered allegations of other misconduct on the part of Sergeant Montgomery, and informed Undersheriff Bonneville. These allegations were as follows: that Sergeant Montgomery had been involved in car insurance fraud prior to being hired by the Kitsap County Sheriff's Office; that he had perjured himself in a personal domestic violence court proceeding while employed by the Sheriff's Office; that he had taken a gun from a young man while off duty, and had failed to turn in that gun; and that he had used his position to attempt to influence other public employees. Undersheriff Bonneville concluded that these allegations were sufficiently serious to warrant additional investigation, and therefore referred the case file compiled by Detective Fenton to the Office of Professional Standards (OPS) of the Kitsap County Sheriff's Office.

The Office of Professional Standards was charged with conducting investigations and providing information to the division chief. The decision, then, as to whether Sergeant Montgomery should be disciplined resided with Chief Gulla, with appeal of such decision to be evaluated by Undersheriff Bonneville. Sergeant Dave White was the Office of Professional Standards officer assigned to conduct the internal investigation.

On May 2, 2001, Sergeant White informed Sergeant Montgomery that he would be placed on paid administrative leave pending the outcome of the internal investigation. Sergeant

[3] Exhibit E-6, KCSO 0012-0015.
[4] Exhibit E-4, 977.

White then recruited Sergeant Ned Newlin to assist him in the investigation. Over the course of several months the sergeants re-interviewed relevant parties, although Sergeant White determined that Young-man C should not be subjected to further interviewing. Additionally, Sergeant White used the Naval Criminal Investigative Service to locate Daniel Glashauser, a former Navy colleague of Sergeant Montgomery who was purported to have been involved in his alleged insurance fraud, and had the Navy conduct an interview with Mr. Glashauser.

On October 1, 2001, Sergeant White wrote a letter to Sergeant Montgomery outlining his alleged violations and the pertinent rules involved in the proof of such violations. On October 5, Sergeant White interviewed Sergeant Montgomery, and on October 15, he ordered Sergeant Montgomery to provide written responses to two questions pertaining to the honesty of his responses in the October 5 interview. Sergeant Montgomery did so, reasserting the truthfulness of his October 5 responses.

At the end of his investigation on November 1, 2001, Sergeant White forwarded his conclusions to Chief Gulla. Chief Gulla then reviewed the investigations from both the Washington State Patrol and Office of Professional Standards in their entirety and sent a letter to Sergeant Montgomery on December 19, outlining his preliminary determinations and potential sanctions. Sergeant Montgomery and the Guild were afforded an opportunity to rebut the allegations at a *Loudermill* hearing on January 24, 2002. Chief Gulla then requested that Sergeant White conduct additional investigations; the subsequent investigations caused Chief Gulla to change his preliminary determination with respect to several allegations.

Chief Gulla issued a notice of termination to Sergeant Montgomery on March 8, 2002. This notice sustained five of the seven original allegations and three of the seven expanded allegations. It was Chief Gulla's conclusion that six of the eight sustained allegations warranted

termination. The Guild filed a grievance of the termination, which was denied by Chief Civil Deputy Gary Simpson in a letter dated April 5, 2002. As provided for in the Agreement, the Kitsap County Deputy Sheriff's Guild filed a demand for arbitration with the American Arbitration Association. Arbitration hearings took place before Arbitrator David Gaba on January 13-17, 2003, and March 24-26, 2003, in Port Orchard, Washington. The parties filed post-hearing briefs, which were received on June 3, 2003.

V. DECISION

The Applicable Standard is Just Cause.

While there is no contractual definition of "just cause", it is reasonably implied that the parties intended application of the generally accepted meaning that has evolved in labor-management jurisprudence: that the "just cause" standard is a broad and elastic concept, involving a balance of interests and notions of fundamental fairness. Described in very general terms, the applicable standard is one of reasonableness:

> …whether a reasonable (person) taking into account all relevant circumstances would find sufficient justification in the conduct of the employee to warrant discharge (or discipline.)[5]

As traditionally applied in labor arbitrations, the just cause standard of review requires consideration of whether an accused employee is in fact guilty of misconduct. An employer's sincere but mistaken belief that misconduct occurred will not suffice to sustain disciplinary action. If misconduct is proven and if the contract allows, another consideration is whether the severity of disciplinary action is reasonably related to the seriousness of the proven offense and the employee's prior record. It is by now axiomatic that the burden of proof on both issues

[5] *RCA Communications, Inc*. 29 LA 567, 571 (Harris, 1961). See also *Riley Stoker Corp*., 7 LA 764,

resides with the employer.

The Guild in its brief makes valuable reference to the "just cause" standard as seminally defined by Arbitrator Carroll Daugherty, which incorporates seven tests as follows:

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the proven offense and (b) the record of the employee in his service with the company?[6]

If one or more of the answers to these questions is negative, then normally the just cause requirement has not been satisfied.

The Applicable Burden of Proof is Clear and Convincing Evidence.

In a case involving the discharge of an employee, it is the employer's burden to sustain its allegations and to establish that there was just cause for the termination. As a leading treatise in the area notes:

> Discharge is recognized to be the extreme industrial penalty since the employee's job, seniority and other contractual benefits, and reputation are at stake. Because of the seriousness of the penalty, the burden generally is held to be on the employer to prove guilt of wrongdoing, and probably always so where the agreement requires "just cause" for discharge.[7]

In this context, it is appropriate for the Arbitrator to demand clear and convincing evidence. As

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767 (Platt, 1947).

[6] *Enterprise Wire Co*., 46 LA 359, 363-4 (1966).

[7] Elkouri and Elkouri, *How Arbitration Works* 905 (5th Ed. 1987).

Arbitrator Richman explained:

> The imposition of a lesser burden than clear and convincing proof fails to give consideration to the harsh effect of summary discharge upon the employee in terms of future employment.[8]

An arbitrator can go on to address the question of appropriateness of disciplinary action only if satisfactory evidence has proven misconduct in the instance that led to the termination.

The Issues.

The Guild contends that Sergeant Montgomery was not accorded due process in the investigations that led to his termination. This contention includes a number of perceived violations. If it were to be determined that either the investigation of the Washington State Patrol or that of the Office of Professional Standards was fatally flawed, then any allegations that were sustained as a consequence of those investigations would be *a priori* eligible for dismissal.

The Guild further contends that the administration has a bias against Sergeant Montgomery, resulting from Sergeant Montgomery's Guild activities and consequent political discord with the administration. The Guild alleges that this bias played a significant role in the investigation of the Deputy and influenced the outcome of that investigation.

In addition to the contentions of the Guild, I will address the allegations that Chief Gulla sustained in his final decision and the remedies he dictated for those sustained allegations. The eight sustained allegations were as follows:

Allegation One: Physical and mental abuse by Sergeant Montgomery of his son.

Expanded Allegation One: Denial by Sergeant Montgomery that he physically and

[8] *General Telephone Co. of California*, 73 LA 531, 533 (Richman, 1979). See also: *Atlantic Southeast Airlines, Inc.*, 101 LA 515 (Nolan, 1993) (using clear and convincing standard*); J. R. Simplot Co*., 103 LA 865 (Tilbury, 1994) (same); *Collins Food International, Inc*., 77 LA 483, 484-485 (Richman, 1981) (same). The Employer bears this burden of proof both with respect to proving the alleged violation, and with respect to demonstrating the

mentally abused his son.

Allegation Two: Perjury by Sergeant Montgomery in a court document filed by him in Kitsap County District Court South on December 22, 1994.

Expanded Allegation Two: Denial by Sergeant Montgomery that he perjured himself in a court document filed by him in Kitsap County District Court South on December 22, 1994.

Allegation Three: Commitment of insurance fraud by Sergeant Montgomery in 1989; namely, that he took, from a parking lot, a car owned by him and his wife and burned it to collect insurance money.

Expanded Allegation Three: Denial by Sergeant Montgomery that the 1989 car insurance fraud incident occurred.

Allegation Five: Abuse by Sergeant Montgomery of his law enforcement position to attempt to influence Prosecutor's Office employees regarding decisions to charge his son, Young-man C.

Allegation Six: Exhibition of inappropriate conduct displayed by Sergeant Montgomery toward the School District, Prosecutor's Office and Juvenile authorities.

Chief Gulla determined termination to be an appropriate remedy for allegations one, two and three and expanded allegations one, two and three. If I concur with him in sustaining any or all of these allegations, I will need to address the appropriateness of termination as a remedy for the sustained allegations.

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appropriateness of the penalty. *Pepsi-Cola Co*., 104 LA 1141 (Hockenberry, 1995).

The Investigation.

The Guild in its brief is exhaustive in detailing the many procedural and substantive errors that it contends occurred in the course of the investigations. It concludes that both investigations were seriously flawed, and is insistent that these flaws are sufficient to justify Sergeant Montgomery's reinstatement.

The Guild's argument that Sergeant Montgomery was denied his right to a *Loudermill* hearing is found to be without merit, inasmuch as the hearing held January 24, 2002 clearly served that purpose. Indeed, Chief Gulla revised his decision on some particulars subsequent to that hearing; this modification certainly supports the argument that the Guild and the Deputy were accorded substantial due process prior to the termination decision.

As to the Guild's argument that Chief Gulla was not the decision-maker in fact or law, I find the testimony by both Chief Gulla and Undersheriff Bonneville contradicts this interpretation, noting that both officers would have had to perjure themselves for this argument to be valid. Chief Gulla was already retired from the Sheriff's Office when he testified; there would have been no motive for him to perjure himself by upholding Undersheriff Bonneville's testimony if that testimony were inaccurate. In fact, the hearing provided an opportunity for Chief Gulla, unfettered by the possibility of reprisal-- he had already retired-- to share any improprieties that may have occurred during the investigation or decision to terminate. I found Chief Gulla's testimony to be credible.

The Guild also contends that Detective Fenton's investigation on behalf of the Washington State Patrol was not thorough and fair. I do find some merit in this argument, in particular as it pertains to Detective Fenton's lack of previous experience; his lack of even-

handedness in conducting the investigation; his conduct of group interviews of school personnel; and his failure to interview Port Orchard Officer McFann, who had been first to interview Young-man C after the school contacted the Child Protective Services. In short, Detective Fenton's investigation appeared to be biased and overreaching in that the investigation of Sergeant Montgomery quickly diverged from the issue of child abuse into the field of any "bad acts" that Sergeant Montgomery might have committed over the previous fourteen years.

Concerning the investigation conducted by the Office of Professional Standards, the Guild raises the fact that the two sergeants (White and Newlin) who conducted the investigation were in direct competition with Sergeant Montgomery for an imminent examination for promotion to lieutenant. While this is true, it does not preclude the investigation having been fair. The Guild contends that the length of the investigation effectively precluded Sergeant Montgomery from competing for lieutenant, in that he was denied access to basic study materials. However, that interference does not mean that the investigation was inappropriately long: the issue of the investigation having impeded Sergeant Montgomery's rights vis-à-vis the examination is something he could appropriately address with a civil service grievance. Furthermore, the motivation for Sergeants White or Newlin to be biased in their investigation would be far outweighed by the motivation to avoid the discredit attached to even the appearance of bias. While Sergeant White may have been handicapped by Detective Fenton's methods, he produced a thorough and detailed record and report. Yes, there were deficiencies in the overall investigation; good work can always be done better. However, the deficiencies were trivial compared to the majority of investigations conducted in an industrial relations setting, and I believe that Sergeant White sought to be both fair and impartial. As stated by Elkouri:

> "If however, an arbitrator feels the company has complied with the spirit of the procedural requirement and the employee was not adversely affected by management's

failure to comply, the company's action may be deemed sufficient."[9]

The Guild also argues that the termination process for Sergeant Montgomery took too long. Certainly, the investigation process that led to Sergeant Montgomery's termination was a long one, but its issues were many and complex, and the County argues that the length of the investigation was a function of the investigators' thoroughness. The County in its brief discusses the issue of protecting employees from what it categorizes as "hasty termination decision(s)", and references *Aerosol Techniques, Inc*., wherein it was concluded that "there is an inherent unfairness in discharging employees first, then determining whether they deserve it."[10] The pivotal point is that the length of the investigation did not result in prejudice to Sergeant Montgomery: his property rights were not violated in this regard because he was on active duty during the Washington State Patrol investigation and on paid leave with full benefits during the Office of Professional Standards investigation.

The Guild also objects to Sergeant White's having allowed Sergeant Montgomery's ex-wife, Sara Brees, to contact her sister unilaterally with reference to the timetable for Sergeant Montgomery's alleged car insurance fraud. The Arbitrator does find Sergeant White to have been remiss in this regard. However, in light of the numerous witnesses interviewed and documents received, this oversight is minor.

The entire question of political discord between Sergeant Montgomery and the Sheriff's administration due to Sergeant Montgomery's service as Guild President appears not to be supported by the facts. The administration promoted Sergeant Montgomery to sergeant after he was named Guild President, and the Sheriff approved the end of Sergeant Montgomery's

[9] Elkouri and Elkouri, *How Arbitration Works* 919 (5th Ed. 1997).
[10] *Aerosol Techniques, Inc*., 48 LA (BNA) 1278, 1279-80 (Summer, 1967).

probationary sergeant status at the end of the Deputy's tenure as Guild President. These two events mitigate the argument that the administration was largely motivated in its conduct of these investigations by a desire to persecute Sergeant Montgomery. While Detective Fenton may have been overzealous, he came from outside of the agency and would have had no animus towards Sergeant Montgomery. Moreover, even if there were some animosity on the part of the administration, the central question remains whether Sergeant Montgomery did engage in any of the alleged misconducts and, if so, whether appropriate discipline was applied.

Allegation One.

With respect to the allegation of physical and mental abuse by Sergeant Montgomery toward his son, I concur with the Guild that the County failed to establish just cause, and the allegation is not sustained. The Guild correctly argues that the County failed to prove by clear and convincing evidence that Sergeant Montgomery abused his son. Indeed, I would add that a preponderance of the evidence supports the conclusion that Sergeant Montgomery did not abuse his son and I sympathize with him for the pain that he must have gone through as part of the hearing process.

Almost all of the testimony concerning Sergeant Montgomery's alleged abuse of his son (other than the testimony of Ms. Cox) was hearsay (or double hearsay)-- regurgitation of the stories of an obviously troubled youth. It is undisputed that Young-man C is a serial liar who has changed his story of alleged abuse a number of times. Prior to the allegations of abuse against his father, Young-man C had already established a reputation in the community as person whose word could not be trusted. The County makes much of the testimony of Lieutenant Loreli Thompson of the Lacey Police Department who is experienced in dealing with victims of child

abuse. Ms. Thompson felt that Young-man C was telling the truth when he recanted yet again and returned to his story of abuse. I find it likely the Young-man C lies to get out of trouble and generally tends to tell people what he thinks they want to hear; I believe that Young-man C thought that Lieutenant Thompson wanted to hear that he had been abused. Furthermore, I find it troubling that Lieutenant Thompson did not review the Child Protective Services case file prior to assisting Detective Fenton in interviewing Young-man C. In short, Young-man C is a sociopath whose testimony cannot be trusted, and there is no physical evidence to corroborate any of his stories.

One of the remarkable aspects of this case is that no witnesses testified to any physical marks or bruises on Young-man C and that there was no third party corroboration of abuse other than the testimony of Kymm Cox. Ms. Cox, whose testimony about a single incident was vague, did not include any specific examples of behavior that might not have appropriately and lawfully occurred between any parent and child. Indeed, her testimony would tend to exculpate Sergeant Montgomery due to its startling lack of examples of abuse during the prolonged time she lived with both Sergeant Montgomery and Young-man C.

In its brief, the Guild makes the assertion that:

> …the County cannot subject Craig Montgomery or any of the other Guild members to discipline for promiscuity, substandard parenting, or any of other of a wide range of potential human frailties or character flaws that Kitsap County deputies or other human beings might possess.[11]

This statement is well put, and I would agree that, even had the County provided clear and convincing evidence of some deficiencies in Sergeant Montgomery's parenting (short of committing a crime), such deficiencies would not have been relevant to the performance of his professional duties. I see no evidence of even such shortcomings, much less of any child abuse:

[11] Guild's Post-Hearing Brief.

Craig Montgomery has been a caring and concerned parent in dealing with his obviously troubled child, and I applaud his efforts in this regard. If this allegation were the only issue with respect to Sergeant Montgomery's behavior, his reinstatement would be unequivocally endorsed.

Expanded Allegation One.

This allegation is not sustained, inasmuch as it is attendant on the sustainability of allegation one.

Allegation Two.

The allegation of perjury by Sergeant Montgomery in his December 22, 1994 statement in District Court South is not sustained. This allegation is a result of information supplied by Carole Merritt during the Washington State Patrol investigation of the child abuse allegation. Ms. Merritt maintained that Sergeant Montgomery made false statements in a Response to a Petition for an Order of Protection that she had filed against him. In that Response, Sergeant Montgomery stated "our romantic relationship was terminated by me in early to mid-July 1994."[12] While I find this statement to have been disingenuous, in that there was clearly sexual contact between Sergeant Montgomery and Ms. Merritt subsequent to mid-July, 1994, I lack the proper adjectives to describe their liaisons and concur with Mr. Cline that that later contact could only be categorized as something other than "romantic." Therefore, the statement in the Response was more a matter of "sharp practice" than perjury, and cannot be construed as unlawful. The Guild makes the point that a critical component of proving perjury is that the statement under question be clear, unambiguous, and not susceptible to differing interpretations.

[12] Exhibit E-4, 1264-1273.

Sergeant Montgomery's statement in his Response, while misleading, does not meet the definition of perjury. The Kitsap County Sheriff can certainly discipline Sergeant Montgomery for possibly misleading the court; however, the notion of progressive discipline would require a written warning.

Expanded Allegation Two.

While the truth or falsity of this allegation is predicated on the sustainability of allegation two, I would like to note at this point that when Sergeant Montgomery testified during the investigation and at the arbitration hearing that he had not had sexual relations with Ms. Merritt since mid-July, 1994, it is my considered opinion that the Deputy was lying. Evidence to contradict his statement is abundant. In his January 30, 1998 letter to Kymm Cox, Sergeant Montgomery stated:

> I did sleep with Carole for a couple of months after we started dating. I could not give you the exact time we quit, I do remember it being before Halloween (Jin/Jerry went trick/treat with me that year is my referance [sic].[13]

Both Ms. Merritt and Ms. Cox testified that at one point in December of 1994, Carole Merritt went to Sergeant Montgomery's house uninvited at a late hour, and that, upon finding Kymm Cox there, Ms. Merritt began screaming that she herself had slept with Sergeant Montgomery only the night before. I find the excited utterance of Carole Merritt wholly believable when taken in concert with Sergeant Montgomery's letter to Ms. Cox. Having witnessed the demeanor of the parties testifying and reviewed the physical evidence, I believe that Sergeant Montgomery was not being truthful at this point of the hearing.

Since it has been determined that Sergeant Montgomery did not perjure himself in the

[13] Exhibit E-4; 1249-1254.

court document in question, this allegation is not upheld. However, it is clear that in the course of the investigation and subsequent grievance of his termination, Sergeant Montgomery repeatedly lied about the actual timeline of his sexual encounters with Ms. Merritt. I would like to note that his lying about this conduct casts considerable doubt on the overall credibility of his testimony.

Allegation Three.

I find that the County has met the burden of proof and that there is clear and convincing evidence with respect to allegation three. Therefore, this allegation is sustained.

During Detective Fenton's investigation, Carole Merritt told him that Sergeant Montgomery had admitted the particulars of the theft, burning, and false insurance claim related to the disappearance of his ex-wife's Ford Thunderbird in October of 1989. Additionally, Ms. Merritt said that the Sergeant had indicated an unnamed Navy colleague whom he had used as a reference when applying to the Kitsap County Sheriff's Office assisted him in the fraud. Detective Fenton went on to obtain detailed testimony of the disappearance of the car from the Deputy's ex-wife, Sara Brees. The Naval Criminal Investigative Service was able to locate Daniel Glashauser, a former Navy colleague of Sergeant Montgomery who was a reference on his Kitsap County Sheriff's Office application. Special Agent John Warden of the AFOSI Detachment interviewed Mr. Glashauser at the request of Detective Fenton, and found Mr. Glashauser's testimony of the car insurance fraud to be credible.

The Guild emphasizes that the testimony of Sergeant Montgomery's ex-girlfriends Carole Merritt and Kymm Cox should be discounted, characterizing them as vindictive toward the Deputy. The Guild maintains that Ms. Merritt and Ms. Cox have remained in communication

with each other and with the Deputy's ex-wife, Sara Brees, and that they have fabricated Sergeant Montgomery's involvement in the car insurance fraud. Agreeing that both Ms. Cox and Ms. Merritt intensely dislike Sergeant Montgomery, I have limited the weight given their testimony accordingly. Carole Merritt provided detailed testimony regarding Sergeant Montgomery's having a picture of the burnt car on his toolbox and his having on two occasions made specific reference to the episode. This testimony alone has very limited weight. Likewise, Kymm Cox's testimony that Sergeant Montgomery had joked about his knowledge on the subject of car insurance fraud was not particularly probative.

While most of the witnesses involved in this arbitration have other agendas (it would be an understatement to say that a number of the witnesses "disliked" Sergeant Montgomery), I can conceive of no reason why Mr. Glashauser would perjure himself in this matter. Mr. Glashauser provided testimony at the arbitration hearing by telephone from Fort Gordon, Georgia. The Guild contends that because there are discrepancies between Mr. Glashauser's various testimonies his narrative should be dismissed in its entirety. However, the critical issue not satisfactorily addressed by the Guild is what possible motivation Mr. Glashauser would have to lie. As the County correctly points out, Mr. Glashauser has acknowledged personal involvement in a criminal enterprise, which acknowledgment is clearly against his personal interests, and could lead to military discipline and demotion.

Sergeant Montgomery countered by alleging that Mr. Glashauser had an affair with his then wife Sara Brees. However, even if that were true, an affair thirteen years ago would provide no credible justification for Mr. Glashauser to lie about the insurance fraud. It is also questionable whether Sergeant Montgomery would have used Mr.Glashauser as an employment reference if he had known of Mr. Glashauser's having an affair with his wife.

Again, I emphasize that the testimonies alone of Carole Merritt and Kymm Cox would not have been sufficient to meet the burden of proof of clear and convincing evidence. However, the fact that it was Ms. Merritt's testimony that led to the discovery and subsequent testimony of Mr. Glashauser about the fraud supports the argument that Ms. Merritt's testimony was essentially truthful. The testimony of both Ms. Merritt and Ms. Cox was strongly corroborated by the testimony of Mr. Glashauser, whose testimony was credible and detailed (although as pointed out by Mr. Cline it was also at times rambling, confused, and contradictory). The very inconsistencies in detail that the Guild considers critical to the unbelievability of Mr. Glashauser's narrative are for me additional support for the credibility of that narrative. It is true that Mr. Glashauser's testimony was rambling and contradictory, but it is normal after fourteen years to have a muddled recollection of an event; that Mr. Glashauser's testimony contained discrepancies supports the argument that he was providing information from his best recollection rather than retailing a fabricated story.

The County in its brief provides some relevant citations:

> Arbitrators and triers of fact always keep in consideration the fact that a witness may be motivated to testify falsely by some self-interest.[14]

> One of the most reliable factors to be considered by an arbitrator in resolving a credibility issue is the existence or non-existence of a bias, interest, or other motive that would influence a witness' testimony.[15]

Discussing the relative credibility of Sergeant Montgomery and other witnesses, the County in its brief makes the point that "other witnesses, in contrast, most often have no incentives to fabricate testimony, and such unbiased accounts tend to be credited by arbiters."[16] Surveying the respective testimonies of Sergeant Montgomery and Mr. Glashauser with respect to the car

[14] *J&F Steel Corp*., 117 LA (BNA) 1695 (Froct, 2002).
[15] *Federal Aviation Admin*., 112 LA (BNA) 129 (Sergent, 1999).
[16] Post-Hearing Brief of Kitsap County.

insurance fraud, I must ask myself whose testimony was self-interested and whose testimony went against self-interest. For me to believe Sergeant Montgomery's testimony that he had no involvement in the insurance fraud, Ms. Merritt, Ms. Cox and Mr. Glashauser would all have to be lying. Furthermore, Ms. Merritt would have had to enter into a conspiracy with Mr. Glashauser prior to her providing information that led Detective Fenton to locate him (which would have meant that she also would have had to lie about not knowing his identity).

The Guild greatly emphasizes its contention that Sergeant Montgomery had passed two polygraph tests, one at the time he applied for permanent employment with the Kitsap County Sheriff's Office in 1993, and another one administered to him by the Washington State Patrol as part of a background check that same year. While the test results for the Kitsap County test have unfortunately been lost, the Guild, the Deputy and the County concur that during that polygraph exam Sergeant Montgomery answered questions pertaining to fraud and auto theft, involvement in serious crime, and falsification or withholding of information, and that he would not have been hired as an officer had he failed to pass that polygraph test.[17] As to the second test, administered by the Washington State Patrol, there is no documentation as to whether it occurred because the record retention period has passed. Sergeant Montgomery testified that the examiner told him that he had passed immediately after the test was administered. In contradiction, the Guild's polygraph expert, Richard Peregrin, who has administered polygraph tests for the Washington State Patrol, testified that the Patrol never informs test takers of their test results. In any event, it is immaterial; I believe that Sergeant Montgomery passed both polygraph examinations.

Mr. Peregrin was an extremely knowledgeable and compelling witness. I would note that, had he administered the polygraph test that Sergeant Montgomery passed, I would have

given more weight to that result. However, Mr. Peregrin himself testified that the "peak of tension" testing technique employed by the Kitsap County Sheriff's Office has an eight to nine percent inaccuracy rate. He further concurred that the validity of any polygraph test depends largely on the method and skill of the one administering the test, and that polygraph tests can be sabotaged by a determined test taker. At the hearing, no evidence was introduced as to the techniques, training or competence of the person who administered Sergeant Montgomery's polygraph.

Carole Merritt testified that Sergeant Montgomery had bragged to her about his ability to pass what he characterized as lie detector tests,[18] and Kymm Cox testified that Sergeant Montgomery had joked to her about having lied on the polygraph test he took as part of the Kitsap County Sheriff's Office application process.[19] While the testimony of these two ex-paramours of Sergeant Montgomery can be discounted, we can still question the validity of the polygraph examination itself.

Polygraph tests are controversial; the County points to the frequency of cases in which the overall reliability and admissibility of such tests are called into question. I do not dispute the fact that Sergeant Montgomery passed a polygraph exam to qualify for his employment with the Sheriff's Office, but that fact is not sufficient counterweight to the evidence presented (primarily by Mr. Glashauser) that he was involved in the insurance fraud. Indeed, the testimony of the Guild's own expert witness, Mr. Peregrin, made it clear that the Deputy's having passed the test was no assurance that he had not been involved in the fraudulent activity in question. As stated by the Washington Court of Appeals:

We hold that until the polygraph achieves general acceptance by the scientific

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[17] Exhibit E-12, 14.
[18] Tr. at 1593:24-1594:6.
[19] Tr. at 1454:16-1455:11.

> community, the defendant's right to (present) relevant polygraph evidence must bow to accommodate the State's legitimate interest in excluding inherently unreliable evidence.[20]

Expanded Allegation Three.

Expanded allegation three is sustained. Given that allegation three is sustained, there is clear and convincing evidence on the record that Sergeant Montgomery lied repeatedly about the insurance fraud, including lying under oath during Kitsap County's Internal Investigation into his alleged misconduct.

The Guild can make many valid arguments as to why an officer should not be discharged for indiscretions (including crimes) occurring fourteen years ago. What is most problematic to me is that the facts presented at the hearing support a finding that Craig Montgomery lied during an internal investigation and has continued to mislead his employer up until his time of termination. While many workplace indiscretions do not deserve termination, it is a core job requirement of a commissioned peace officer to uphold the faith of his department and the citizens of his jurisdiction concerning his veracity. This is no longer the case with Sergeant Montgomery, and his termination for lying during the internal investigation must be sustained.

Allegation Five.

Although it need not be addressed at this point, I find that this allegation is not sustained. Chief Gulla sustained this allegation, but concluded it warranted discipline short of termination. The burden of proof for clear and convincing evidence was not met by the County: while it is possible that Sergeant Montgomery exhibited an inappropriate level of anger in the interactions described, it is impossible to ascertain from the testimony of the involved parties whether

[20] *State v. Ahlfinger*, 50 Wn. App. 466, 469, 749 P.2d 190 (1988).

Sergeant Montgomery was trying to exert undue influence or merely becoming understandably, if inappropriately, agitated over his son's circumstances. Understanding how any parent in Sergeant Montgomery's position would have been passionate in looking out for the welfare of his child, I applaud Sergeant Montgomery for his efforts on behalf of his son. However, as the County has noted, there is no substantive need to address either this allegation or allegation six since I have upheld other allegations whose remedy is more serious.

Allegation Six.

Although it need not be addressed at this point, this allegation is not sustained. Chief Gulla sustained this allegation but concluded it warranted discipline short of termination. As noted under allegation five, further comment is not necessary given my having upheld allegation three and expanded allegation three.

Is Termination Warranted?

Chief Gulla based his decision to terminate Sergeant Montgomery upon his sustaining allegations one through three and their attendant expanded allegations. The only allegations that I agree should have been sustained are allegation three and expanded allegation three.

The County in its brief notes that "integrity and honesty are critical requirements for a police officer. The public expects – indeed demands – that officers be above approach."[21] This categorization is supported by the Sheriff's Office policy 4.01.00, General Behavior, which states that "a member of this department shall not act or behave privately or officially in such a

[21] Post-Hearing Brief of Kitsap County.

manner as to bring discredit upon himself or the department"[22] and by Section 11.3.07 of the Sheriff's Civil Service Rules pertaining to false or fraudulent statements. The County cites the conclusion of an arbitrator in another instance:

> When a Police Officer engages in criminal activity, not only does he violate his Oath of Office but, more importantly, he destroys the very fabric of the officer-community relationship.[23]

The seriousness of the episode of the insurance fraud and, more importantly, the repeated misstatements made by Sergeant Montgomery when questioned about this episode cannot be minimized. Sergeant Montgomery's repeated lying about this event is a terminable offense in and of itself. Sergeant Montgomery lied about this car insurance fraud on his 1991 application for employment with the Kitsap County Sheriff's Office, in his testimony to Detective Fenton during the Washington State Patrol investigation, in his testimony to Sergeant White during the Office of Professional Standards' investigation, at the January 24, 2002, *Loudermill* hearing, and at the arbitration hearing. When Sergeant Montgomery applied for a full time position with the Kitsap County Sheriff's Office in 1993, he signed a document stating that he understood:

> should investigation at any time disclose false or misleading information given in my application or interview(s), this may result in disqualification from employment or discharge.[24]

Sergeant Montgomery lied under oath during an Internal Investigation and his having done so is sufficient justification for the decision to terminate him.

Let me note that whether termination is an appropriate remedy for allegation three by itself could be arguable, unless Sergeant Montgomery were to have been convicted of the fraud. Mr. Cline makes some excellent arguments that insurance fraud fourteen years in the past should

[22] Exhibit E-4, 953.
[23] *City of Galion*, 112 LA (BNA) 771 (Talarico, 1999).
[24] Exhibit E-4, KCSO 1256.

not be a terminable offense. However, there is no need to belabor the question of whether termination might have been too harsh a remedy for this sustained allegation alone, the critical factor here is the Deputy's misstatements during the Internal Investigation, which constitutes expanded allegation three and for which, I reiterate, termination is an appropriate remedy.

VI. CONCLUSION

It is the County's burden to show, by clear and convincing evidence that just cause existed for Sergeant Montgomery's termination. The weight of evidence did not support the County's position in on all of the allegations against Sergeant Montgomery, and I have reversed Chief Gulla's decision on all but two of the allegations the Chief had sustained. I have upheld the Chief's decision to sustain allegation three and expanded allegation three, and I have also upheld his conclusion that termination is an appropriate remedy for the latter allegation.

It is my decision that the County did have just cause for the termination of Deputy Craig Montgomery based upon expanded allegation three alone.

VII. AWARD

The grievance is partially granted in that allegations one, two, five and six, and expanded allegations one and two are not sustained. The grievance is partially denied in that allegation three and expanded allegation three are sustained and Craig Montgomery's termination is upheld.

While the collective bargaining agreement of the parties provides that "the fees and expenses of the arbitrator, shall be provided by the party ruled against by the arbitrator," the Guild prevailed on the majority of instances of alleged misconduct, while the County prevailed on the ultimate issue of termination. Accordingly all fees and expenses charged by the Arbitrator shall be equally borne by the parties. This interim award becomes final thirty days from today's date.

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David Gaba, Arbitrator
June 23, 2003
Seattle, Washington